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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 72.

J. D. SHELLEY, ETHEL LEE SHELLEY, his wife, and JOSEPHINE FITZGERALD, *Petitioners*,

v.

LOUIS KRAEMER and FERN KRAEMER, his wife, *Respondents*.

On Writ of Certiorari to the Supreme Court of Missouri.

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF REAL ESTATE BOARDS.

ROGER J. WHITEFORD,
JOHN J. WILSON,
Attorneys for Amicus Curiae.
815 15th Street, N. W.,
Washington 5, D. C.

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Supreme Court of the United States

October Term, 1947.

No. 72.

J. D. Shelley, Ethel Lee Shelley, his wife, and Josephine Fitzgerald, *Petitioners*,

v.

Louis Kraemer and Fern Kraemer, his wife, *Respondents*.

Brief of National Association of Real Estate Boards as Amicus Curiae.

JURISDICTIONAL STATEMENT.

This Court entertains jurisdiction of this cause as a result of the granting of a petition for writ of certiorari based primarily upon the claim that the judgment of the Supreme Court of Missouri deprived Petitioners of a privilege or immunity of a citizen of the United States, allegedly the right to own and occupy land in the City of Saint Louis, Missouri, deprived them of property without due process of law, or denied them the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE.

Respondents are privy to a signatory of a restrictive covenant entered into in 1911, by the terms of which Negroes are not permitted to acquire title or to occupy certain land situate in the City of Saint Louis, Missouri. One Fitzgerald, whose title had descended from another signatory of the said restrictive covenant, purported to deed to Petitioners

Shelley, who are Negroes, a piece of land subject to said covenant.

Respondents in the Circuit Court of Saint Louis, a regularly constituted Court within the Missouri State Court organization, sought enforcement of the covenant and an injunction against occupancy by Petitioners Shelley. The Circuit Court of Saint Louis held the restrictive covenants invalid. On appeal, the Supreme Court of Missouri reversed, *Kraemer* v. *Shelley*, 198 S. W. 2d 679 (1946).

INTEREST OF THE NATIONAL ASSOCIATION OF REAL ESTATE BOARDS.

The application of constitutional law principles to real property law is of utmost interest to those whose business it is to buy and sell land. In the making of sales, entering into of contracts, evaluation of real property, and in the making of decisions as to the soundness of investments in real estate, those in the real estate business are vitally interested, not only in the existing constitutional law, but also in the predictability of future judicial determinations of the validity of the various types of legal devices used as the everyday tools of the real estate man.

QUESTIONS RAISED.

The National Association of Real Estate Boards is interested, in particular, in the following questions raised by the petition for certiorari in the instant cause:

I.

Whether said restrictive covenant is void as in conflict with the Fourteenth Amendment, or Acts of Congress pursuant thereto?

II.

Whether said covenant is void as in conflict with an existing treaty of the United States?

III.

Whether said covenant is void as against the "public policy" of the United States?

IV.

Whether the rendition of a decision by the Supreme Court of Missouri, or any State Court, after full hearings and a trial free from procedural defects, is "State action" within the meaning of the Fourteenth Amendment?

V.

If the decision of a cause by a State Court without procedural defect is "State action" under the Fourteenth Amendment, did the Supreme Court of Missouri by its decision below

A. make or enforce any law which abridged the privileges and immunities of citizens of the United States so as to injure Petitioners,

B. deprive Petitioners of life, liberty or property without due process of law, or

C. deny Petitioners the equal protection of the law?

ARGUMENT.

I.

Covenants running with the land restricting the use or ownership of land by Negroes are not void because of conflict with the Fourteenth Amendment, or Acts of Congress passed pursuant thereto.

The Fourteenth Amendment applies to "State action" exclusively and could not void private covenants, which are the acts of individual citizens. This Court stated in *Corrigan* v. *Buckley*, 271 U. S. 323 at 330 (1926):

> "And the prohibitions of the 14th Amendment 'have reference to state action exclusively, and not to any action of private individuals.' *Virginia* v. *Rives*, 100 U. S. 313, 318; *United States* v. *Harris*, 106 U. S. 629, 639. 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.' *Civil Rights Cases*, 109 U. S. 3, 11. It is obvious that

> none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. And, plainly, the claim urged in this Court that they were to be looked to, in connection with the provisions of the Revised Statutes and the decisions of the courts, in determining the contention, earnestly pressed, that the indenture is void as being 'against public policy,' does not involve a constitutional question within the meaning of the Code provision."

The contention that the above quoted portion of *Corrigan v. Buckley* is dicta is unfounded. Even if the Fourteenth Amendment does not apply to the District of Columbia, this Court in that case did not base its decision upon that argument, but on the broader ground that the Fourteenth Amendment could not affect the covenant even were it applicable to the District of Columbia. The point was, therefore, essential to the reasoning used to support the decision in *Corrigan v. Buckley*, and was not dicta.

The *Corrigan* decision has been interpreted by the highest courts of many of our States as determinative of the validity of restrictive covenants in respect to the Fourteenth Amendment.

The Supreme Court of Colorado has said:

> "A person who owns a tract of land and divides it into smaller tracts for the purpose of selling one or more may prefer to have as neighbors persons of the white, or Caucasian race, and may believe that prospective purchasers of the tracts would entertain similar preference, and would pay a higher price if the ownership were restricted to persons of that race. Surely, it is not unreasonable to permit such a person to insert in his deeds a provision restricting not only the occupancy but also the ownership of the tracts conveyed by him.
>
> "Such a restriction would not violate any right protected by the Fourteenth Amendment to the Constitution of the United States. That amendment prohibits state action only; it has no application to discriminatory provisions in deeds or wills. *Civil Rights Cases,*

109 U. S. 3, 3 Sup. Ct. 18. In *Corrigan* v. *Buckley*, 271 U. S. 323, 46 Sup. Ct. 521, the court, referring to the Fifth, Thirteenth and Fourteenth Amendments, said: 'It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property.'" *Chandler* v. *Ziegler*, 88 Colo. 1 at 5, 291 Pac. 822 (1930).

In *Stewart* v. *Cronan*, 105 Colo. 393, 98 P. 2d 999 (1940) the Supreme Court of Colorado refused to overrule *Chandler* v. *Ziegler, supra.*

In 1942 the Supreme Court of Oklahoma in *Lyons* v. *Wallen*, 191 Okla. 567, 133 P. 2d 555 (1942) held a restrictive covenant not in violation of the Fourteenth Amendment, and more recently in *Hemsley* v. *Sage*, 194 Okla. 669 at 670, 154 P. 2d 577 (1944) pointed out the basic fallacy in Petitioners' argument in the instant cause in these words:

> "It is next urged on the strength of Allen v. Oklahoma City, 175 Okla. 421, 52 P. 2d 1054, that contracts such as this are void as offensive to our Constitution. However, defendants say that they recognize that the issue in that case differs from the issue here and the similar issue in Lyons v. Wallen, 191 Okla. 567, 133 P. 2d 555. This is correct. The difference lies in the Constitutional right of property owners to contract to impose restrictions on the sale, lease, or use of their real property (Lyons v. Wallen, supra; Corrigan v. Buckley, 271 U. S. 323, 70 L. ed. 969, and the annotation 114 A. L. R. 1237), and the lack of a right or power of a Government to legislate to like effect, Allen v. Oklahoma City, supra, and Buchanan v. Warley, 245 U. S. 60, 61 L. ed. 149. The trial court's judgment is correct in its applications of the law."

In 1945 the Oklahoma Court expressly refused to overrule *Lyons* v. *Wallen, supra*, and reiterated the proposition that a restrictive covenant is not in violation of the Fourteenth Amendment, *Hemsley* v. *Hough*, 195 Okla. 298, 157 P. 2d 182 (1945).

The Supreme Court of Wisconsin in *Doherty* v. *Rice*, 240 Wis. 389 at 396-7, 3 N. W. 2d 734 (1942) declared:

> "The defendants' counsel contends that the restriction as to sale is invalid because violative of the Wisconsin constitutional provision relating to conveyances in restraint of alienation and because violative of the Fourteenth Amendment of the United States constitution. They concede that as to the Fourteenth Amendment the weight of authority is against them. The confession is not only fully warranted, but is compelled. The only case supporting it is *Gandolfo* v. *Hartman* (C.C. S.D. Cal. 1892), 49 Fed. 181, 16 L.R.A. 277, a decision of the United States district court of California which is contrary to *Corrigan* v. *Buckley*, 271 U.S. 323, 46 Sup. Ct. 521, 70 L. Ed. 969. The latter must be taken as finally settling that question. Even the cases that hold the restriction void for other reasons hold that it is not violative of the United States Constitution, as *Porter* v. *Barrett*, 233 Mich. 373, 206 N.W. 532, and *Los Angeles Inv. Co.* v. *Gary*, 181 Cal. 680, 186 Pac. 596, 9 A.L.R. 115. Among those cases directly holding restraints upon sales to non-Caucasians not violative of the United States Constitution are the following: *Queensboro Land Company* v. *Cazeau*, 136 La. 724, 67 So. 641 L.R.A. 1916B, 1201 An. Cas. 1916B, 1248; *Koehler* v. *Roland*, 275 Mo. 573, 205 S.W. 217; *Corrigan* v. *Buckley*, *supra*."

The Supreme Court of Georgia in *Daley* v. *Savannah Bank and Trust Company*, 199 Ga. 353, at 364, 34 S.E. 2d 522 (1945) expressed a similar opinion.

The overwhelming weight of opinion in the lower state courts has been of similar tenor.

Lion's Head Lake v. *Rzezinski*, 23 N.J. Misc. 290, 43 A. 2d 729 (Dist. Ct. 1945)

Thornhill v. *Herdt*, 130 S.W. 2d 175 (Mo. App. 1939)

Stone v. *Jones*, 66 Cal. App. 2d 264, 152 P. 2d 19 (1944)

Burkhart v. *Loftin*, 63 Cal. App. 2d 230, 149 P. 2d 722 (1944)

Burke v. *Kleiman*, 277 Ill. App. 519 (1934) *appeal dismissed*; 355 Ill. 390 189 N.E. 372 (1934)

Mays v. *Burgess*, 79 App. D.C. 343, 147 Fed. 2d 868, 162 A.L.R. 168 (1945) *cert. denied* 325 U.S. 868 (1945)
Herb v. *Gerstein*, 41 F. Supp. 634 (D.C. D.C. 1941)

The statutes passed pursuant to the Fourteenth Amendment, 8 U. S. C. §§ 41-2 (1940), cannot void the covenant, as they do not extend further than the amendment they were intended to enforce, and are limited to "State action" exclusively.

Virginia v. *Rives*, 100 U. S. 313 (1879)
Civil Rights Cases, 109 U. S. 3 (1883)

The approval of restrictive covenants *per se*, implicit in the *Corrigan* decision and recognized and applied by the overwhelming weight of authority in the state courts, has, in effect, become a rule of property. Millions of dollars' worth of real property has changed hands at values computed in reliance upon *Corrigan* v. *Buckley* and the state authorities following it. The National Association of Real Estate Boards is vitally interested in this particular question, as evaluation of future land values, an essential part of the real estate business, entails an estimate of the permanence of constitutional law principles as applied by this Court to local real property law.

II.

Covenants running with the land restricting the use or ownership of land by Negroes are not void for conflict with an existing treaty of the United States.

It may be seriously doubted whether the Federal Government by means of a treaty can effect a change in local state law upon a subject outside the field of international affairs.

Roca v. *Thompson*, 232 U. S. 318 (1914)
Patsone v. *Pennsylvania*, 232 U. S. 138 (1914)
Heim v. *McCall*, 239 U. S. 175 (1913)

Compagnie Francaise v. *State Board*, 186 U. S. 380 (1902)

The common law as to the transfer, ownership and use of land are matters of local state law.

Green v. *Neal*, 6 Pet. 291 (U. S. 1832)
Case v. *Kelly*, 133 U. S. 21 (1890)
Port of Seattle v. *Oregon and W. R. Co.*, 255 U. S. 56 (1921)

The question is not before this Court at this time, however, as no treaty has been urged by Petitioners which purports to change the law of real property within the State of Missouri.

Articles 55 and 56 of the Charter of the United Nations relied upon by Petitioners read, in their entirety:

"*Article 55*

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

"*Article 56*

"All Members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55." 59 Stat. 1045 (1945)

The United States could not be considered, by the above treaty, to have changed any State law. It has agreed to

take steps *within its power as the Federal Government* to support vaguely stated economic and social ends. The Federal Government has, in fact, taken no such steps, even within its power; especially has it enacted no legislation purporting to change the real property law of the several states.

The case of In re *Drummond Wren*, 4 D. L. R. 674 (Ontario, 1945) is, of course, not controlling upon this Court. Nor does the court which rendered that decision stand, in the judicial structure of Canada, in a position analogous to this Court, but rather to the Supreme Court of Missouri. In such a position it felt free to examine international declarations of policy to assist it in determining the public policy of the Province of Ontario. There is little question that the Supreme Court of Missouri, standing in an analogous position, could similarly determine the public policy of the State of Missouri under which Missouri land contracts were to be construed. But there was no duty placed upon that Court that it give the Charter more weight than other expressions of public policy, state or Federal, or that it give the Charter any consideration whatsoever. See Argument III, *infra*.

Petitioners also rely upon the resolution against racial discrimination, *Department of State, Participation of the United States in International Conferences* (1947) 170, accompanying the *Act of Chapultepac of* 1945, 12 *Department of State Bulletin* 339 (1945). Neither the "Act" nor the resolution are treaties of the United States. 59 Stat. *passim*, nor do they purport to change the real property law of any state of the United States. They were, in effect, mere recommendations of action to the respective governments, recommendations of action within the power of the respective governments.

III.

Covenants running with the land restricting the use or ownership of land by Negroes are not void as against the "public policy" of the United States.

Courts may refuse to enforce contracts on the ground that they are in conflict with public policy. Public policy, however, is not a sociological attitude; it is part of the common law of the jurisdiction by which, by the rules of the conflict of laws, the contract is to be construed. It is found in the acts of the legislature and of public officials of such jurisdiction.

As Chief Judge Groner said in *Mays* v. *Burgess*, 79 App. D. C. 343 as 347, 147 Fed. 2d 869 at 873, 162 A. L. R 168 (1945) *cert. denied* 325 U. S. 868 (1945):

> "And the public policy of a State of which courts take notice and of which they give effect must be induced—in the main—from these sources [public laws and actions of public officials]. Surely it may not—properly—be found in our personal views on sociological problems."

The public policy by which a Missouri contract, of which a restrictive covenant running with Missouri land is one, is to be measured is the public policy of the State of Missouri, not of the United States. The Supreme Court of Missouri has determined in this cause what the applicable public policy is. Its action in so doing does not present a Federal question, and is not properly subject to review by this Court.

American Railway Express Co. v. *Kentucky*, 273 U. S. 269 at 272-3 (1927)

Enterprise Irrig. Dist. v. *Canal Co.*, 243 U. S. 157 at 165-6 (1917)

In re *Drummond Wren*, 4 D. L. R. 674 (Ontario, 1945) is not at variance with the proposition just stated. It might be cited to support the proposition that the Supreme Court

of Missouri, whose counterpart decided the *Wren* case, *could* look outside the public laws and acts of officials of Missouri to those of the United States, including international expressions of policy, but could hardly be cited to *require* that the Supreme Court of Missouri do so, and much less to *require* that such vague and unenforced expressions of aims must be given greater weight than the other evidence which a court may properly examine in determining the public policy of its jurisdiction.

Nor could it be said, even if there were any obligation placed by the Federal Constitution upon the Supreme Court of Missouri to apply Federal "public policy" to Missouri contracts, that the "public policy" of the United States is so clearly opposed to such restrictive covenants as to void them. If there is any place within the continental limits of the United States where Federal public policy is part of the common law, it is the District of Columbia, but Chief Judge Groner, in *Mays* v. *Burgess*, quoted *supra*, continued by stating:

> "As to the District of Columbia, we must take judicial notice of the fact that separate schools are established for the white and colored races; separate churches are universal and are approved by both races; and that in the present local housing emergency, large amounts of public and, perhaps also, of private funds have been expended in the establishment of homes for the separate use of white and colored persons." 79 App. D. C. 343 at 347, 147 F. 2d at 873 (1945) *cert. denied* 325 U. S. 868 (1945)

Lest it be contended that District of Columbia officials are not Federal officers, it need only be pointed out that the legislature of the District of Columbia to which they are responsible is the national legislature, Congress. This Court may in addition take judicial notice of the similar establishment by the general Federal government of separate facilities for negro and white citizens in the armed forces and, most pertinent, in public housing.

IV.

The rendition of a decision, after a trial free from procedural defects, by the Supreme Court of Missouri that a restrictive covenant against ownership and occupancy by Negroes was valid and had created certain legal relationships which state courts must recognize was not "State action" within the meaning of the Fourteenth Amendment.

It is firmly established that the Fourteenth Amendment and Acts of Congress passed pursuant thereto, such as 8 U. S. C. §§ 41 and 42 (1940) are restrictions upon "State action" alone and not upon the acts of individuals.

Virginia v. *Rives*, 100 U. S. 313 (1879)
Civil Rights Cases, 109 U. S. 3 (1883)

This Court has recognized that the acts of state courts, of state judges and of state quasi-judicial bodies in denying *procedural* safeguards and privileges to litigants may constitute "State action" under the Fourteenth Amendment.

Brinkerhoff-Faris Co. v. *Hill*, 281 U. S. 673 (1930) (Opportunity to present case)
Raymond v. *Chicago Traction Co.*, 207 U. S. 20 (1907) (Defective procedure in tax assessment)
Twining v. *New Jersey*, 211 U. S. 78 (1908) (Compulsory self-incrimination)
Ex Parte Virginia, 100 U. S. 339 (1880) (Selection of jurors)
Chicago, B. & Q. R. R. v. *Chicago*, 166 U. S. 226 (1897) (Condemnation procedure)
Alabama v. *Powell*, 287 U. S. 45 (1932) (Right to counsel)
Bridges v. *California*, 314 U. S. 252 (1941) (Contempt of court. *State* was a *party* to suit, also, as in other criminal cases relied on by Petitioners.)

The general statements made in these cases, upon which Petitioners rely to support the proposition that *any* state court judgment is "State action" under the Fourteenth

Amendment, must be restricted to *procedure.* This is indicated by the observations of former members of this Court in two of the above-cited cases.

In *Brinkerhoff-Faris Co.* v. *Hill, supra,* at 680, Mr. Justice Brandeis, speaking for the Court, said:

> "It is true that the Courts of a State have the supreme power to declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on Federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law or has overruled principles or doctrines established by previous decisions upon which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction upon this Court."

Although *Raymond* v. *Chicago Traction Co., supra,* concerned procedural, or objective law, Mr. Justice Holmes feared the opinion would be construed too broadly and would have preferred to deny the proposition altogether. In a dissenting opinion he said at pages 40-1:

> "We all agree, I suppose, that it is only in most exceptional cases that a State can be said to deprive a person of his property without due process of law merely because of the decision of a Court without more. The discussion in *Chicago, Burlington & Quincy R. R.* v. *Chicago,* 166 U.S. 226, concerned a judgment assumed to be authorized by a statute of the State, and in that case the judgment of the state court was affirmed, so that no very extensive conclusions can be drawn from it. So far as I know, this is the first instance in which a Circuit Court has been held authorized to take jurisdiction on the ground that the decision of a state tribunal was contrary to the 14th Amendment."

Nor are the other cases relied upon by Petitioners at variance with the proposition that all state court judgments are not "State action." *Cantwell* v. *Connecticut,* 310 U.S.

296 (1940) was a criminal action and the State was a *party*, so that "State action" was clear in any event. *Gandolfo* v. *Hartman*, 49 Fed. 181, 16 L.R.A. 227 (C.C. S.D. Cal. 1892) is not authority for the proposition that the judgment of a state court is "State action" under the Fourteenth Amendment, as plaintiff sought to enforce the covenant in a *Federal* court. The Fourteenth Amendment was only material if the District Judge felt it voided the covenant absolutely; otherwise he would have referred to the Fifth Amendment. District Judge Ross in that opinion at page 183 said, "Such a contract is absolutely void, and should not be enforced in any court,—certainly not in a court of equity of the United States." The actual holding in the case was, therefore, that the covenant was void; this Court's decision in the *Corrigan* case overrules that holding.

The proposition that a state court judgment is not, absent procedural defects in the trial, "State action" is amply supported by the opinions of this Court:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *Arrowsmith* v. *Harmoning*, 118 U.S. 194, 195; *Iowa Central Ry. Co.* v. *Iowa*, 160 U.S. 389, 393; *Tracy* v. *Ginzberg*, 205 U.S. 170, 177; *Bonner* v. *Gorman*, 213 U.S. 86, 91; *McDonald* v. *Oregon R. R. & Nav. Co.*, 233 U.S. 665, 669." *American Railway Express Company* v. *Kentucky*, 273 U.S. 269 at 273 (1927)

> "The errors here assigned are, first, that the judgment [of a state court] deprived the Defendants of their property without due process of law, contrary to the Fourteenth Amendment; . . .
>
> "A motion to dismiss is made by the defendant in error because the federal questions were too late, in that they were raised for the first time in petitions for rehearing which the court denied without opinion. The record does not sustain this ground in respect to the objection based on the Fourteenth Amendment, because that appears in the assignment of error filed on appeal from the District Court to the State Supreme Court. The assignment, however, has no substance in

it. The parties to this action have been fully heard in the state court in the regular course of judicial proceedings and in such a case the mere fact that the State Court reverse a former decision to the prejudice of one party does not take away his property without due process of law. This was expressly held in the case of *Central Land Co.* v. *Laidley*, 159 U.S. 103, 112." *Tidal Oil Co.* v. *Flanigan*, 263 U.S. 444 at 449-50

"It is elementary and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character." *McDonald* v. *Oregon R. R. & Nav. Co.*, 233 U. S. 665 at 669-70 (1914)

As Mr. Chief Justice Waite said in *Arrowsmith* v. *Harmoning*, 118 U. S. 194 at 195-6 (1886):

"At most, this was an error of judgment in the court. The Constitutional provision is, 'nor shall any *State* deprive any person of life, liberty, or property without due process of law.' Certainly a State cannot be deemed guilty of a violation of this Constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision." (Emphasis is the Court's.)

Mr. Justice Cardoza's remarks in *Doty* v. *Love*, 295 U.S. 64 at 70-4 (1935) are inconsistent with the concept that the rendering of a decision in a contested action in which there was no defect of procedure is "State action" within the meaning of the Fourteenth Amendment. So also are:

Kryger v. *Wilson*, 242 U.S. 171 (1916)
Pennsylvania R. R. Co. v. *Hughes*, 191 U.S. 477 (1903)
Morrow v. *Brinkley*, 129 U.S. 178 (1889)

The lead of this Court has been followed in the Circuit Courts of Appeal.

The United States Circuit Court of Appeals for the 9th Circuit has held that a foreclosure in California courts of a deed of trust which ". . . if permitted, suffered, and/or condoned, would subject plaintiff to the deprivation of his property, without due process of law," could not raise any Federal question, since the Fourteenth Amendment did not apply to the acts of private individuals. *Davidow* v. *Lachman Bros. Inv. Co.*, 76 F. 2d 186 at 187-8 (C.C.A. 9th 1935). In *Reese* v. *Louisville Trust Co.*, 58 Fed. 2d 638 (C.C.A. 6th 1932) Circuit Judges Hicks, Hickenlooper and Simmons in a short *per curiam* opinion held that the decision of a case by a state court was not "State action" within the meaning of the Fourteenth Amendment.

Mr. Chief Justice Vinson, while sitting on the United States Court of Appeals for the District of Columbia, in respect to the parallel problem of what is "Governmental action" under the Fifth Amendment, said:

> "The only Governmental action in respect to the instant case consisted in the enactment of the Railway Labor Act and the functioning of the Board thereto. . . . In the election at hand a craft of 86 coach cleaners, 70 of whom were colored, by a vote of 42 to 35 chose as their collective bargaining agent or representative the Brotherhood of Railroad Carmen. It may be that certification of the Brotherhood will mean that white, rather than colored, men will represent the coach cleaners in negotiations with the carrier. If so, that condition will obtain because a majority of the coach cleaners voted for it, and not as a result of any Governmental action." *National Federation of Railway Workers* v. *National Mediation Board*, 71 App. D.C. 266 at 274-5, 110 F. 2d 529 at 537-8 (1940) *cert. denied* 310 U.S. 628 (1940)

If all state court judgments are "State action" within the meaning of the Fourteenth Amendment, it may be wondered whether a union shop agreement is enforceable lest it discriminate against non-union labor as a class, or whether any contract of hire is enforceable, lest it discriminate against those who were not hired. Similarly, one may

wonder whether a dealer-producer marketing agreement, the lease of an apartment, or any executory contract, could be enforced without an examination by the state court, and ultimately by this Court, to determine *whether the parties had treated all outside persons with that scrupulous regard for fairness and equality which the Fifth and the Fourteenth Amendments demand of those who enjoy the public trust as state and Federal officials.* It is almost too clear for comment that the drafters of, and certainly those who ratified, the Fourteenth Amendment, contemplated no such extension of its terms to cover all private contracts. It has been said that "There is no law without a sanction." When the judges in the many prior decisions said that the Fourteenth Amendment did not void contracts between individuals, they were saying and, more important, holding that such contracts were enforceable.

V.

If the decision in a cause tried in the state courts without procedural defects constitutes "State action" under the Fourteenth Amendment, the Supreme Court of Missouri by its decision in the instant case, nevertheless, did not:

A. "make or enforce any law" which abridged the privilege and immunity of a citizen of the United States so as to injure Petitioners;

The Supreme Court of Missouri did not make or enforce any *law*, at all. The term *law* as used in Section 10 of Article 1 of the Constitution in regard to impairment of the obligations of contracts has been firmly established as referring to acts of legislatures and quasi-legislative bodies exclusively.

Fleming v. *Fleming*, 264 U. S. 29 (1924)
Tidal Oil Co. v. *Flanigan*, 263 U. S. 444
Kryger v. *Wilson*, 242 U. S. 171 (1916)
Cross Lake Shooting and Fishing Club v. *Louisiana*, 224 U. S. 632 (1912)

New Orleans Water Works Co. v. *Louisiana*, 185 U. S. 336 (1902)
Saint Paul, M. & M. R. R. v. *Todd County*, 142 U. S. 282 (1891)

That the use of the term *law* in this clause of the Fourteenth Amendment was not inadvertent, and was not intended to cover all types of "State action," is indicated by the use of the term in this clause alone, in comparison with the prohibitions against "State action" in general in the remainder of Section 1 of the Fourteenth Amendment. The case of *Buchanan* v. *Warley*, 245 U. S. 60 (1917), relied upon by Petitioners, dealt with an ordinance passed by a quasi-legislative body, a *law* within the meaning of this clause, and therefore not in point in the instant cause.

Nor can the judgment of the Supreme Court of Missouri be held to abridge a privilege and immunity of a citizen of the United States. *Buchanan* v. *Warley, supra*, establishes merely that a citizen is immune from discrimination by public officials so that Negroes are systematically segregated from white citizens. The *Buchanan* case is not authority that Negroes, or any other citizen of the United States, have any privilege and immunity that *other private citizens* in the use and disposition of their own property must treat all citizens of the United States equally. There is no case urged by Petitioners which so holds. Such a holding could only lead to chaos in the commercial world. Nor do any citizens have any privilege or immunity to own or occupy property except in accordance with real property law.

B. deprive Petitioners of life, liberty or property without due process of law,

Petitioners have not shown in what respect they have been deprived of life, liberty or property. They are alive, and have not, as far as the record indicates, been restrained. In what respect have they been deprived of their property? The Supreme Court of Missouri has decided, according to the law of real property of Missouri, that the Petitioners had no good title to the said property nor the right to occupy the same. In other words, the land was not their

property prior to the decision. The state court decision merely declared what the existing legal relationships were. It deprived them of no interest in the land which they had prior to the decision. As this Court has said:

> "The Plaintiff also insists that by the judgment of the Supreme Judicial Court of Massachusetts he has been deprived of his property without due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States. This proposition is without merit. Within the meaning of that amendment, the court, by its judgment, did not deprive the plaintiff of property without due process of law. He sought a decree adjudging that he was entitled to the money received by Ginzberg from O'Hearn. The court, proceeding entirely upon principles of general and local law, and giving all parties interested in the question an opportunity to be heard, decided that plaintiff had no right to that money. The decision of a State Court involving nothing more than the ownership of property with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—upon which question we express no opinion—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a state court, involving merely the ownership of property, could be brought here for review—a result not to be thought of." *Tracy* v. *Ginzberg*, 205 U. S. 170 at 177-8 (1907).

Nor can it be said that the State Court did not act other than in accordance with due process of law. The trial, in all courts, as far as the record indicates, was fair in all respects. The trial was conducted in accordance with the procedures used in similar causes before the courts of Missouri. Petitioners do not urge any *specific* instance in which there was any lack of due process save that the

Supreme Court of Missouri did not decide the case in the way in which they had urged. This does not constitute a lack of due process.

Kryger v. *Wilson*, 242 U. S. 171 (1916)
Pennsylvania R. R. Co. v. *Hughes*, 191 U. S. 477 (1903)
Morrow v. *Brinkley*, 129 U. S. 178 (1889)

C. deny Petitioners the equal protection of the laws.

No instance has been cited by Petitioners in which they have been treated in any respect by the Supreme Court of Missouri in a different way than any other citizens would have been in a similar situation. It is not seriously contended by Petitioners that had Negroes agreed to restrict the use or ownership of their property to Negroes, the Missouri Courts would not have enforced such a covenant. The construction of the "equal protection of the laws" clause by this Court does not indicate any basis upon which Petitioners can urge that such has been denied to them. For example:

> "Counsel asserts that the rights claimed under the Constitution of the United States were the right to due process of law, and the right to the equal protection of the laws.
>
> "The right to the equal protection of the laws was certainly not denied, for it is apparent that the same law or course of procedure, which was applied to Tinsley, would have been applied to any other person in the State of Texas, under similar circumstances and conditions; and there is nothing in the record on which to base an inference to the contrary." *Tinsley* v. *Anderson*, 171 U. S. 101 at 106 (1898)

Power Co. v. *Saunders*, 274 U. S. 490, 493 (1927)
Traux v. *Corrigan*, 257 U. S. 312, 332-3 (1921)
Hays v. *Missouri*, 120 U. S. 68 (1887)
Plessy v. *Ferguson*, 163 U. S. 537 (1896)

A decision relied upon by Petitioners recognized this limitation of the "equal protection" clause.

> "In answering petitioner's contention that this discrimination constituted a denial of his constitutional

right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. *Plessy* v. *Ferguson*, 163 U. S. 537, 544; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 160; *Gong Lum* v. *Rice*, 275 U. S. 78, 85, 86. Compare *Cumming* v. *Board of Education*, 175 U. S. 528, 544, 545." *Missouri* ex rel. *Gaines* v *Canada*, 205 U. S. 337 at 344 (1938)

CONCLUSION.

Inasmuch as the instant covenant is neither void as in conflict with the Fourteenth Amendment or Acts of Congress passed pursuant thereto, nor as in conflict with a treaty of the United States, and since the "public policy" of the United States does not control the validity of a Missouri contract and is, furthermore, not in conflict with the instant covenant, and inasmuch as the decision of the Supreme Court of Missouri, hereunder reviewed, is not "State action" within the meaning of the Fourteenth Amendment and; furthermore, cannot be said to make or enforce any law abridging Petitioners' privileges and immunities as citizens of the United States, to deprive them of their life, liberty or property without due process of law, nor to deny them the equal protection of the laws, the National Association of Real Estate Boards, as *amicus curiae*, respectfully urge that this Honorable Court either dismiss the writ of certiorari for failure to present a Federal question or, in the alternative, affirm the judgment below of the Supreme Court of Missouri.

Respectfully submitted:

ROGER J. WHITEFORD,
JOHN J. WILSON,
Attorneys for Amicus Curiae.
815 15th Street, N. W.,
Washington 5, D. C.